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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No.....

JAMES M. FOSTER and JOHN H. JOHNSON, Co-Partners, d/b/a J. M. FOSTER AND COMPANY,
Petitioners,
vs.
CLARENCE H. BUCKNER,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, above named, respectfully pray for a writ of certiorari to the United States Court of Appeals

for the Sixth Circuit to review the decision of that Court filed April 7, 1953, as amended May 13, 1953, after consideration of a petition for rehearing, but nevertheless affirming a jury verdict and judgment for $136,500.00 against petitioners.

OPINIONS BELOW

The opinion of the Court of Appeals as amended is as yet unreported, but appears in Volume II, pages 482 to 487 and 499, respectively, in the certified copy of the transcript of record on file in this court.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

This is an action brought by Clarence H. Buckner, respondent, to recover damages for personal injuries sustained June 30, 1949, when he fell a distance of about 70 feet during the course of his employment as a painter of the structural iron work in a steel plant under construction for the McLouth Steel Company in Trenton, Michigan. He was an employe of a painting subcontractor. The immediate cause of the fall was the entanglement of a long rope with an over-head traveling crane used by petitioners in the furtherance of their work as subcontractors, placing machinery. This was in no way related to respondent's work. The rope, about 75 feet long, was under the sole control of respondent. He used it to raise and lower a so-called aluminum pick or platform on which he and his partner worked (R. 258, 310-312, 314). The pick was about 18 inches wide and 22 to 26 feet long without hand-holds or railings (R. 141, 257).

The traveling crane is of the type supported by two sets of rails that extend the full length of the building near the top of the walls (R. 78). The span of the crane is 85 feet from the center of one rail to the other (R. 349). The building is about 1000 feet long and approximately 80 feet high from the floor to the apex of the peaked roof. The crane can be moved back and forth the full length of the building (R. 78).

Respondent's fall occurred while he and his partner were changing from a higher to a lower position. The entire operation required about eight minutes (R. 267). The only observation made by either one of these men with reference to the crane was just before they started to move the pick, ropes and paint (R. 154, 168, 263, 264). A moment or so before the accident, respondent was climbing down a beam. He got onto the pick in its new and lower position and then in his own words the accident occurred as: "I just got back on there and I started to turn around when the crane hit me, or the rope, or whatever was hanging down" (R. 267-268). He admitted that the crane operator below could do nothing that would dislodge the rope from the pick (R. 309-310). His working partner said that respondent's foot might have knocked the rope off the pick (R. 173).

Trial was had by jury and a verdict and judgment was rendered in favor of respondent for $136,500.00 on April 16, 1952. During the course of trial petitioners made timely motions for a directed verdict of no cause for action and a mistrial. These were denied. Thereafter further motions for judgment *non obstante veredicto* and a new trial were made. All were denied (R. 469, 471).

On the date of accident respondent and his employer were subject to the Michigan Workmen's Compensation

Law (R. 11). The Michigan State Accident Fund was the compensation insurance carrier (R. 48). The Michigan Workmen's Compensation Law in effect at that time provided:

> "Where the injury for which compensation is payable * * * was caused under circumstances creating a legal liability in some person other than the employer to pay damages * * *, the employe may at his option proceed either at law against that person * * *, or against the employer for compensation under this act, but not against both and if compensation be paid under this act the employer may enforce for his benefit or for that of the insurance company carrying such risk, or the commissioner of insurance as the case may be, the liability of such other person." (Sec. 17.189, Mich. Stat. Ann., Sec. 413.15, Mich. Comp. Laws, 1948.)

Respondent filed his suit October 11, 1949. On this date the workmen's compensation carrier was paying and thereafter continued to pay hospital and nursing expenses in behalf of respondent. It paid $12,916.25 over a period of one year immediately following the accident (R. 59). Petitioners contended that this barred respondent from maintaining this action (R. 10, 26-28). They raised the point on motion for summary judgment (R. 26-27). The trial court ruled against this contention in a formal order (R. 29). The Court of Appeals upheld this ruling and in doing so stated in part:

> "In fact, plaintiff did not know that these expenses had been paid by the carrier" (R. 486).

This statement in the form of a fact is wholly unsupported by the record and is contrary to an admission by respondent's counsel in his opening statement to the jury that respondent not only received the benefits referred to, but did so "upon his agreement to repay the Michigan State

Accident Fund * * *" (R. 87). He had previously admitted receipt of such benefits at pre-trial hearings (R. 54, 55). Respondent's counsel insisted "that this question should be disposed of by the court prior to trial" (R. 47). The trial judge's reaction in this regard is reflected in one of several pre-trial comments:

> "That is a law question, and I have to decide it myself. I am not going to let a jury decide whether or not I have jurisdiction to hear this matter, so we are going to make a pre-trial determination of that * * *" (R. 50).

The Court of Appeals, in ruling that respondent had not made an election, gave retroactive effect to an amendment of the Michigan Workmen's Compensation Law, particularly the above quoted section. The amendment eliminates the necessity of making a binding election. Pub. Acts 1952, No. 155, effective September 18, 1952.

Respondent's chief allegation of negligence was the failure to have a lookout man ride on top of the crane (R. 3). However, he admitted that no such lookout man was ever used. He said: "* * * I never had seen a safety man on the crane" (R. 307). Actually, petitioners and respondent's employer each had a safety man on the ground (R. 351, *et seq.*, and 331 *et seq.*).

Respondent had been on this job for several months (R. 305). He not only knew that that no so-called safety man was employed to ride on the crane, but was also conscious of the great noise in the building and difficulty of hearing the crane in operation or the sound of the warning bell with which it was equipped (R. 306). He knew if his rope were to drop without adjustment as to length and fall in the path of the moving crane there would be danger of an accident (R. 310-312), but did nothing to eliminate this danger (R. 314). Except for the initial observation when

respondent and his partner started to move, they made no further observations for the crane. This general background led petitioners to plead that respondent assumed the risk of injury and that his injuries were caused in whole, or in part, or were contributed to by his own negligence (R. 9). The trial judge refused to give a requested instruction on the assumption of risk doctrine (R. 42), but referred to it in his charge as follows:

> "Whatever risks Mr. Buckner may have assumed as inherent in the dangerous work at which he was employed, he did not assume the risk of being injured through the negligence of some other person" (R. 443).

The Court of Appeals held that the doctrine of assumption of risk is not applicable (R. 485), citing *Restatement of the Law of Torts*, §466.

Petitioners' several motions raised all the points discussed so far and included further assignments why (1) a verdict of no cause for action should have been directed (2) a mistrial declared and (3) a new trial granted. These assignments covered alleged prejudicial conduct by respondent's counsel; prejudicial statements, rulings and instructions by the trial judge, refusal to instruct the jury as requested and excessiveness of verdict. The Court of Appeals overruled all contentions of error and affirmed the judgment of the District Court.

Petitioners filed a petition for rehearing. This was denied, but resulted in an amendment of the opinion originally filed by striking the sentence "As he prepared to climb down, plaintiff saw the crane was not moving" and substituting therefor the following sentence: "As the plaintiff prepared to climb down, the crane was not moving" (R. 499).

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, U. S. C. A., Section 1254 (1). The decision entered April 7, 1953, as amended May 13, 1953, is sought to be reviewed, and the date of this application for certiorari is June 8, 1953.

QUESTIONS PRESENTED

1. Whether under the Michigan Workmen's Compensation Law in effect June 30, 1949, respondent is barred as a matter of law from maintaining this action.

2. Whether the 1952 amendment of the Michigan Workmen's Compensation Law, Pub. Acts 1952, No. 155, is retroactive.

3. Whether the assumption of risk doctrine as published in the Restatement of the Law of Torts, §466, was correctly stated and applied by the Court of Appeals.

4. Whether the facts related in the opinion of the Court of Appeals are supported in the record.

5. Whether petitioners' motion for a mistrial should be granted.

6. Whether petitioners' motions for a directed verdict of no cause for action should be granted.

7. Whether petitioners' motion for judgment *non obsatnte veredicto* should be granted.

8. Whether petitioners' motion for a new trial should be granted.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

1. The Court of Appeals, in holding that respondent had not elected to take compensation decided an important question of local law in a way probably in conflict with applicable local decisions, to illustrate, *Schulmeyer v. Central Motor Freight Co.*, 323 Mich. 142, 35 N. W. 2nd 225. Said ruling is also probably in conflict with *Dinardo v. Consumers Power Co.*, 181 Fed. (2d) 104, decided by the Court of Appeals from which the instant appeal is sought.

2. The Court of Appeals, in ruling that the 1952 amendment of the Michigan Workmen's Compensation Law, Pub. Acts 1952, No. 155, is retroactive, decided an important question of local law in a way probably in conflict with applicable local decisions, in particular, *Tarnow v. Railway Express Agency*, 331 Mich. 558.

3. The Court of Appeals erred in stating its conception of the elements of the assumed risk doctrine and citing in support thereof the *Restatement of the Law of Torts* §466. The rule as stated by the Court of Appeals fails to take into account that the Restatement rule is predicated on the theory that a plaintiff may be guilty of contributory negligence if he intentionally and unreasonably exposes himself "to danger created by the defendant's negligence of which danger the plaintiff knows or has reason to know, * * *"

4. The Court of Appeals' opinion is predicated on statements of fact not supported in the record.

5. The Court of Appeals should have ruled favorably on petitioners' motion for a mistrial in the trial court because of the prejudicial injection of insurance into the case in the presence of the jury.

6. The Court of Appeals should have ruled favorably on petitioners' several motions for a directed verdict of no cause for action and for judgment *non obstante veredicto.*

7. The Court of Appeals should have granted petitioners' motion for a new trial.

8. In holding that no prejudicial error was committed against petitioners and that they had a fair and impartial trial, the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by the lower court, as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

WILLIAM J. EGGENBERGER,
1615 Dime Building,
Detroit 26, Michigan,
Counsel for Petitioners.

Dated: June 8, 1953.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No.....

JAMES M. FOSTER and JOHN H. JOHNSON, Co-Partners, d/b/a J. M. FOSTER AND COMPANY,
Petitioners,
vs.
CLARENCE H. BUCKNER,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is intended, not as petitioners' brief on the merits if the writ shall be granted, but to show that the reasons relied on for allowance of the writ are substantial and important, that the decisions below were probably erroneous, and that they call for authoritative determination by this Court.

The reasons relied on will be briefly discussed in the order stated in the petition for the writ under the following abbreviated headings.

I.

RESPONDENT'S ALLEGED ELECTION OF REMEDIES UNDER THE MICHIGAN WORKMEN'S COMPENSATION ACT

Respondent's acceptance of benefits as admitted by his counsel (R. 54, 55, 87) eliminated him as a real party in interest and by statute and decisions subrogated the Michigan State Accident Fund as the only party who might maintain an action. This conclusion finds support in the case of *Dinardo v. Consumers Power Co.*, 181 Fed. (2d) 104, decided April 3, 1950, by Judge Allen of the Sixth Circuit. That case involved the application of the very section of the Michigan Workmen's Compensation Law as in effect June 30, 1949, the date of accident in the instant case. The Court of Appeals recognized that Michigan decisions before 1943, that being the year of an important amendment, were no longer controlling on the question of election of remedies. In the case at bar, as well as the *Dinardo* case, *supra*, the Court of Appeals cited *Fox v. Detroit United Ry.*, 218 Mich. 5, a 1922 decision, for the proposition that a person "had not elected to proceed against the employer for compensation by his acquiescence in payment of hospital and doctor bills by the employer's workmen's compensation carrier." Reliance on the *Fox* case for that proposition at this late date overlooks the 1943 amendment of the Michigan Compensation Law and also the case of *Dornbos v. Block & Guggenheimer, Inc.*, 326 Mich. 626, decided in 1950, where it was held that the "compensation" provided in the compensation act is not only the award in lieu of prospective earnings which the employee loses in consequence of his injury but includes medical, surgical and hospital services. The Court of Appeals did not consider the *Dornbos* case in its opinion, even though it is extensively discussed in petitioners' appellate brief. It is

important to note the trial judge's definition of "compensation." He said:

> "My understanding of compensation payments to an employee is the person who paid a check, not because of medical expense but a check in payment of the time he was away from work" (R. 54).

The lower courts also by-passed *Schulmeyer v. Central Motor Freight Co.*, 323 Mich. 142, which is discussed and cited in the *Dinardo* case. In other words, the trial court and the Court of Appeals failed to apply and follow a well adjudicated local law as required by *Erie Railroad Co. v. Tompkins*, 58 S. Ct. 817, 304 U. S. 64, 82 L. Ed. 1188, 114 A. L. R. 1487.

II.

THE RULING BY THE COURT OF APPEALS THAT THE 1952 AMENDMENT TO THE MICHIGAN COMPENSATION LAW IS RETROACTIVE AND APPLICABLE TO THE CASE AT BAR

Up to now the Michigan Supreme Court has had no occasion to consider this amendment in any of its aspects. It contains no language indicating that the legislature intended it to operate retrospectively, on the contrary, it is quite clear that it was intended to be applied prospectively. The Michigan Supreme Court followed the generally accepted view, especially where a statute is not wholly procedural or remedial in character, that there is a presumption that legislation operates prospectively, unless the legislature clearly indicates otherwise. *Tarnow v. Railway Express Agency*, 331 Mich. 558. In that case, decided in 1951, the Michigan Supreme Court had occasion to pass on a 1943 amendment of the Michigan Workmen's Compensation Law.

The retrospective application of the amendment by the Court of Appeals has given rise to a great deal of confusion and many repercussions. Other states, particularly North Dakota, have enacted similar legislation. This is evidenced in the case of *Nelson v. Westland Oil Co.*, 181 Fed. (2d) 371 (1950), Eighth Circuit. In that decision invoiving three consolidated cases, the Court of Appeals upheld the theory that legislation of this kind is retrospective, but its doubt in doing so is clearly indicated in the following language:

> "If, before these cases are finally determined by the District Court, the Supreme Court of North Dakota shall rule that such actions as these may not be maintained by injured workmen or their dependents upon causes of action which accrued prior to July 1, 1949, the decision of that court, and not our decision, will govern the disposition of these cases."

The only effective way of removing the doubt reflected in the Nelson case is a review in this Court. Petitioners also believe that the retrospective application of the 1952 amendment is plainly erroneous and should be corrected by this Court. *Palmer v. Hoffman*, 63 S. Ct. 477, 318 U. S. 109, 87 L. Ed. 645, 114 A. L. R. 719; *Erie Railroad Co v. Tompkins, supra.*

III.

THE ASSUMPTION OF RISK DOCTRINE AS APPLIED BY THE COURT OF APPEALS

In this connection the Court of Appeals cited the *Restatement of the Law of Torts*, §466, in support of its ruling that the asserted doctrine of assumed risk is not applicable (R. 485). The restatement citation relates to "Types of Contributory Negligence" and states:

"The plaintiff's contributory negligence may be either

(a) an intentional and unreasonable exposure of himself to danger created by the defendant's negligence of which danger the plaintiff knows or has reason to know, or

(b) conduct which, in respects other than those stated in Clause (a), falls short of the standard to which the reasonable man should conform in order to protect himself from harm."

Under the heading of comments there is a discussion with reference to "Voluntary exposure to unreasonable risk." The Court of Appeals stated:

> "In order for this doctrine to bar recovery intentional exposure of himself by a workman to a known danger must be so unreasonable that a reasonably prudent man in his position would not do so. *Restatement of the Law of Torts*, §466, Types of Contributory Negligence."

Assuming, but not admitting that petitioners were guilty of negligence, then under this record respondent would under the undisputed testimony be guilty of contributory negligence as a matter of law. It seems that the use of the restatement referred to as authority to eliminate the assumption of risk doctrine is most misleading and fails to distinguish between the doctrine of assumption of risk and the defense of contributory negligence. This question should be authoritatively decided by this Court and thus further the object and character of the Restatement of Laws, that is, "* * * present an orderly statement of the general common law of the United States * * *."

IV.

THE DECISION OF THE COURT OF APPEALS IS PREDICATED ON STATEMENTS OF FACT NOT SUPPORTED IN THE RECORD

The foregoing reason is well supported in the amendment of the Court of Appeals' original opinion. The amendment strikes the sentence "As he (respondent) prepared to climb down, plaintiff saw the crane was not moving" and substituted in its place the following sentence: "As the plaintiff prepared to climb down, the crane was not moving." The new sentence falls short of correcting a most important and decisive misconception of fact for the reason that the record is barren of testimony that might support the substituted sentence.

Furthermore, the decision is based in part on presumptions of facts without any evidence in support. This is illustrated by the following statement:

> "Presumably plaintiff's rope slipped over the side of the pick for two witnesses saw it hanging down from 8 to 10 feet before the crane started to move" (R. 483).

There is nothing in the record to support this presumption. The observations made by the two witnesses, if true, were not connected with the sequence of events leading up to the accident and were so remote in point of time and absolutely lacking in description of any kind as to whether the rope was hanging down far enough to interfere with the movement of the crane, that their testimony is wholly immaterial and without any probative value whatsoever. This becomes evident in the light of respondent's testimony and that of Roberts, his partner. Respondent and Roberts are the only ones possessed of knowledge relative to the rope.

Their positive testimony clearly and unequivocally establishes that the rope was either kicked or knocked off the scaffold by respondent himself just as he got on the pick (R. 267-268). This occurred a split second before the crane came along. The court evidently misconceived that the rope was hanging in the path of the crane for some time prior to the accident and could have been observed by a lookout man on the crane in time to avert the accident. The true situation is described in the last reference to the record and again in the two following questions and answers by Roberts:

> "Q. Well, did you see the line hanging down when you left the south end of the scaffold before you started to go towards your end?
>
> "A. No, I did not; it was laying on the end of the scaffold when I turned to go" (R. 170-171).
>
> * * * * *
>
> "Q. Do you have any idea how that line could have dropped down?
>
> "A. Well, maybe when Red came down the truss on there, maybe his foot knocked it off or something, I don't know" (R. 173).

The foregoing also dispels and negatives another unsupported statement of fact in the opinion, to wit: "* * * plaintiff threw the rope down on the pick and expected to gather up the rope, * * *." It is quite obvious that this comment is used in the sense that respondent expected to pull up the rope that was hanging down from the pick. The fact is he managed to throw the rope on the pick, and therefore, there was no reason for him to expect to gather up the rope. In this connection he said: "Well, at the time I dropped it I didn't think it was off" (R. 265). "Well, I didn't see it hanging down" (R. 267).

The opinion states as a fact that: "The crane operated at so considerable height and the mill was so long that

the employees on the floor could not foresee the possibility of accident so well as someone on the crane" (R. 483). There is no competent testimony to that effect. Furthermore, this statement is most unfortunate in that it implies that a person is liable for the mere failure of guarding against any kind of possible accident. Such is not the law. *Fort Smith Gas Co. v. Cloud*, 75 Fed. (2d) 413. In that case it is said: "* * * to constitute actionable negligence the injury must have been the natural and probable consequence of the alleged negligent act. The consequence of the negligent act must be within the range of probability as viewed by the ordinary man, and consequences which are merely possible cannot be regarded as either probable or natural."

The court's opinion further stated as a fact that: "Defendants had notice of the particular hazard because of the near accidents and dangerous situations which involved the crane shortly before this occurrence" (R. 484). There is no testimony that either the respondent or petitioners were ever confronted with "the particular hazard" involved in this case. The hazard in this case, if it can be so labeled, was of respondent's own creation. The fact that the crane was stopped twice before to pull up paint were perfectly normal operations. The alleged cable incident arose out of an entirely different operation in no way connected with the painters and is not pertinent to the issue in controversy. Respondent and his partner could have taken the same precaution to stop the crane before they began their descent as was their practice in pulling up paint and thus avoided the accident. Their failure to take this simple precaution, along with their failure to look, and respondent's act of kicking the rope off the pick produced and authored the setting of respondent's unfortunate fall (R. 308, 309, 310, 173).

The opinion also stated that respondent "was doing what any ordinary workman would have done under similar circumstances" (R. 484-485). There is no evidence in the record to support such a statement as a fact.

Petitioners verily believe that a correct conception of the material facts of this case will lead to a reversal of the lower courts.

V.

PETITIONERS' MOTION FOR MISTRIAL

Insurance was brought to the jury's attention by respondent in answer to a question propounded by his counsel, Mr. Markle. It purported to elicit the names of doctors who might have rendered medical care. He said: "Well, I had Dr. Goetz. He looked at me. And I had Dr. Maguire, I think, from the insurance company * * *I mean from J. M. Foster's insurance company" (R. 275). This led to a motion for a mistrial (R. 345, 361-362), but was denied, although the trial judge evidenced concern over this development. True, Mr. Markle argued he did not calculate to bring out the foregoing answer (R. 346). Well, let us refer to the case of *Watroba v. City of Detroit,* 334 Mich. 182. Mr. Markle was defense counsel. Mr. Groefsema was attorney for the plaintiff. During the examination of plaintiff's mother by Mr. Groefsema she referred to a man from an insurance company without naming or identifying him. Mr. Markle immediately challenged Mr. Groefsema's good faith. The opinion quotes Mr. Markle as follows:

> "I think it is a deliberate attempt * * * this is a suit against the city. They are afraid they are not going to recover against the city. They are trying to bring in something outside that has noth-

> ing to do with this case. * * * There is no other reason for Mr. Groefsema to ask that question. He must know the answer."

Applying the same reasoning in the instant case, Mr. Markle's statement that he did not calculate "to bring out that answer" loses its force. Even if his contention is accepted at face value, a later statement clearly shows that he deliberately sought a prejudicial answer that was calculated to appeal to the sympathies and emotions of the jury. He said:

> "Certainly the question I was asking him, I can tell you, the answer I wanted was that he had plans to go to Mayo Clinic, but they want five thousand dollars in advance and he hasn't got the money. That is what I wanted to bring out by that question. He is still talking this morning about the Mayo Clinic" (R. 347).

The impropriety of the foregoing as a basis of mistrial or new trial in Michigan is well illustrated in *Dewey v. Perkins*, 295 Mich. 611; *Harker v. Bushouse*, 254 Mich. 187 and *Holman v. Cole*, 242 Mich. 402.

Respondent's aim and plan to prejudice petitioners in the eyes of the jury from an insurance standpoint is further evidenced in the closing argument by counsel for respondent. He said:

> "Counsel has referred solicitously to Mr. Johnson and Mr. Foster, the defendants in this case, the co-partners, as he calls them, of the J. M. Foster Company. They are not very worried about this case, because neither you nor I have seen them here during the case" (R. 433).

True, the trial judge struck this remark, but the harm was done.

VI.

PETITIONERS' MOTIONS FOR DIRECTED VERDICT OF NO CAUSE FOR ACTION AND FOR JUDGMENT NON OBSTANTE VEREDICTO

This discussion does not include any reference to the Workmen's Compensation Law and the assumption of risk doctrine for the reason that these points have already been covered. The remaining issues, (1) negligence and (2) contributory negligence have also been touched upon, consequently, further extensive treatment is not deemed necessary. Briefly, respondent admitted he did not look for the crane when he dropped his rope without shortening it (R. 314). He also admitted he could have made a similar observation before he started to climb down (R. 317), but did not. The only reported and analogous case is *Uzich v. E. & G. Brooke Iron Co.*, 76 Fed. Supp. 788. The plaintiff in that case, also a painter was working 90 feet above the ground, sustained an injury when he grasped a cable that was controlled from the ground by defendant's employees. Recovery was denied as a matter of law.

Respondent's allegations in his complaint as to duties owed him by petitioners, when viewed in the light of the testimony, represent nothing more than afterthoughts concocted in an attempt to pass the responsibility of his accident to persons other than himself. This is most apparent from the admitted fact that respondent went about his work with full knowledge that petitioners never had a safety man on the crane and that the bell on the crane was not used or if so could not be heard because of a great amount of general noise. In short, respondent never had any such duties in mind, and if he did, he never relied on them.

VII.

PETITIONERS' MOTION FOR A NEW TRIAL

The Court of Appeals limited its decision under this heading to a discussion of petitioners' claim that the jury's verdict was excessive. On this point it is essential to take into account the medical testimony. Dr. Honor was asked whether there is any type of labor that plaintiff can perform. He said: "I advised him to take up watchmaking, or he could get a position where he could sit and do inspection work, or sitting and do any kind of work where he did not have to stand" (R. 284). Except for a so-called arthrodesis of the right ankle, a stiffening operation, plaintiff was not in need of future medical surgery (R. 285). The suggested arthrodesis would cost approximately $250.00 (R. 290). Respondent's alleged earning ability was about $5,000.00 per year (R. 86). The Michigan Supreme Court laid down a well defined limit and rule governing recoverable damages which the Court of Appeals and trial court ignored. *Palmer v. Security Trust Co.*, 242 Mich. 163, clearly announces the rule in this connection. The court said: "We had occasion, in *Sipes v. Railroad Co.*, 231 Mich. 404, to point out that a judgment was excessive if it awarded such a sum as would yield, at five per cent, an annual income approximating previous annual earnings and leave the sum intact at the end of life expectancy." Clearly, the instant verdict, $136,500.00, is excessive when viewed in light of this ruling.

For the purpose of the instant petition it is not deemed necessary to cover in detail the many other grounds urged for a new trial. A cursory reading of said motion (R. 461-466) will quickly disclose many prejudicial errors committed during the course of trial, especially the many prejudicial comments and rulings by the trial judge. This

situation, combined with respondent's general appeal to sympathy led to a verdict without support in fact and law.

VIII.

PETITIONERS' CLAIM THAT THIS CASE CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

Petitioners believe that the statements, rulings, instructions, and refusal to instruct, by the trial court, as outlined in petitioners' several motions, especially their motion for a new trial, calls for determination by this Court of the limits to which a trial court may go in his statements, comments and rulings without rendering the trial unfair. A study of the cases indicates that this Court has had nothing to say on this subject since its decision in *Quercia v. United States,* 289 U. S. 466.

Respectfully submitted,

WILLIAM J. EGGENBERGER,
1615 Dime Building,
Detroit 26, Michigan,
Counsel for Petitioners.

Dated: June 8, 1953.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 852

JAMES M. FOSTER and JOHN H. JOHNSON, Co-Partners, d/b/a J. M. FOSTER AND COMPANY,
Petitioners,
vs.
CLARENCE H. BUCKNER,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported in 203 F. (2d) 527.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

(The Questions Presented are set forth below as in the Petition.)

1. Whether under the Michigan Workmen's Compensation Law in effect June 30, 1949, respondent is barred as a matter of law from maintaining this action.

2. Whether the 1952 amendment of the Michigan Workmen's Compensation Law, Pub. Acts 1952, No. 155, is retroactive.

3. Whether the assumption of risk doctrine as published in the *Restatement of the Law of Torts,* Sec. 466, was correctly stated and applied by the Court of Appeals.

4. Whether the facts related in the opinion of the Court of Appeals are supported in the record.

5. Whether petitioners' motion for a mistrial should be granted.

6. Whether petitioners' motions for a directed verdict of no cause for action should be granted.

7. Whether petitioners' motion for judgment *non obstante veredicto* should be granted.

8. Whether petitioners' motion for a new trial should be granted.

STATEMENT

The Summary and Short Statement of the Matter Involved presented in the Petition misstates and omits many material facts and is, indeed, a statement of the case petitioners would like to have made rather than the case presented by the record. Rather than pick apart each sentence of that Statement respondent has briefly stated the case as it is in the record.

Respondent, Clarence Buckner, and his fellow painter, Roberts, were experienced painters (R. 304, 257) and were using the usual method and equipment. The pick or platform which they used was originally raised into the overhead by the use of the hand line (75-100 feet long) and one rope about 75 feet long, ¾ inch thick. Once in the overhead, the hand line was used only to raise and lower paint (R. 259). In lowering the pick, another ¾ inch rope was used together with the 75 foot rope mentioned above. It was necessary to use 20-30 feet of the 75 foot rope in moving the pick about in the overhead structure (R. 336). The balance of the rope would be tied in a bundle. One of the ¾ inch ropes was attached to each end of the pick. When it was time to move the pick, the painters would hang on to whatever steel member was available, put one end of the rope over a steel member, and by slowly letting out the ropes, lower the pick to some steel beams or other members below. On the occasion in question, after the pick was resting in the lower position, the painters dropped the ropes on to the pick, all the while hanging on to whatever was available. The pick was less than two feet wide and since after being moved the pick was not directly under its former position, the ropes had to be dropped at somewhat of an angle. Frequently the line would not fall entirely on

the pick, but part of it would hang over the edge (R. 266). In lowering the pick just prior to the accident, Mr. Buckner was on the end with the 75 foot rope. Before starting to lower the pick, both men observed the crane which was standing still (R. 264). Respondent thought that the rope fell on the pick but while still up at the old position, hanging to the steel member, he was unable to see whether or not part of it had fallen off the pick on the far side (R. 317). After it was lowered Roberts went down to the pick first. Respondent handed the paint brushes and buckets to him. Respondent then started climbing down a steel truss. The entire procedure took about 6 or 7 minutes. Climbing down took about two minutes. While respondent was climbing down, Roberts was at his end of the pick. He testified that he saw a part of respondent's rope on the pick but did not make sufficient observation to see whether all of it was there or not (R. 168, 185). From the testimony of other witnesses on the ground, it was established that the rope hung below the platform for several minutes prior to the accident. Respondent could not have knocked it off himself since the platform was yanked from under him just as he stepped upon it, after shinnying down from the cross member above. Witness Turner, petitioners' general millwright foreman, saw the rope hanging down while respondent was still climbing down the steel member (R. 211). The crane started up from a position 35 to 200 feet away. The rope was seen by persons on the ground before the crane started up, from 2-5 minutes before the accident. It was urged at the trial that since respondent had not observed the crane just before he started climbing down, he was guilty of contributory negligence. But the crane must have started up after plaintiff had started climbing down. Respondent's general foreman stated that the crane was standing still when he saw Buckner climbing down to the pick just before the accident (R. 216, 217).

Thus the statement in the Petition that Roberts suggested that the rope might have been knocked off by respondent, which was merely a conjecture, was disproved by direct testimony. Petitioners attempt to mislead the court when they place such misstatements in the "Statement of the Matter Involved."

Respondent was working in a proper place where he had been directed to work by his employer (R. 153, 256). He had no opportunity to draw up the rope and to recoil it after gaining the platform, since before he had a chance to do anything the platform was jerked from under him (R. 267-268).

Respondent relied upon several acts of negligence on the part of petitioners. The failure to have a lookout man on the crane was only one of these. The failure to do so was aggravated by the fact that petitioners had had such a lookout or safety man on the crane when their own employees were working in the path of the crane superstructure (R. 245), and by the fact that the trade union stewards had asked that such a safety man be employed (R. 119, 206). Petitioners had refused their request because of the expense involved (R. 206).*

Moreover, it was shown that the usual practice on construction jobs of the type involved here was to have such a safety man (R. 119). Petitioners were further negligent in that the operator of the crane failed to ring the warning bell before starting the crane (R. 93, 94, 116, 154, 169, 132, 265). Finally petitioners' foreman, Leslie Bounds, stated that it was his responsibility to give the signal to start the crane (R. 358) and that before doing so, he was sup-

*Petitioners assert on page 5 of the "Petition" that no lookout man was ever used on the crane. On page 245 of the record one of petitioners' own employees testified that a lookout man had been used on the crane at times. This testimony was never contradicted.

posed to make sure that there was no one working in the path of the crane (R. 352).

He testified that he did observe the painters working above the crane before giving the signal to move, but observed no rope hanging down (R. 352).

Respondent's witnesses, however, testified the rope had been hanging down for from two to five minutes before the crane was moved (R. 92, 105, 211). The jury was entitled to believe the testimony of petitioners' general foreman, R. E. Turner, that the rope was hanging down at least a minute before the crane started up (R. 211).

Petitioners' employee, McMann, saw the rope for a longer period of time (R. 92, 195).

Bounds knew, or should have known, that the operator of the crane could not see up into the superstructure.

The facts relating to the payment of certain hospital and nursing expenses are set forth in the Petition in a misleading fashion. The record supports the statement made in the opinion of the Court of Appeals that "the plaintiff did not know these expenses had been paid by the (insurance) carrier." As is pointed out in respondent's Argument I, in determining the question of election of remedies the court was interested only in the conduct of the respondent up to the time the instant suit was started. Commencement of the instant suit was an election to sue the petitioners, Foster, and respondent was barred from so suing only if he had previously elected to seek compensation. The record shows that at the time the instant suit was started respondent was under the care of three special nurses (R. 271), in bed (R. 270), and in casts (R. 271). The nurses and hospital were paid directly by the insurance carrier and respondent did not know they had been so paid nor had he asked that they be paid (R. 329, 330).

ARGUMENT

I.

DISTRICT COURT AND COURT OF APPEALS PROPERLY HELD THAT RESPONDENT HAD NOT ELECTED TO TAKE COMPENSATION UNDER THE MICHIGAN WORKMEN'S COMPENSATION ACT

Under the Workmen's Compensation Act of Michigan as it was at the time the respondent, Mr. Buckner, was injured required that he elect either to take compensation or to sue Foster & Company, petitioners. Under Michigan law the commencement of the instant suit constituted an election to proceed against petitioners. *Graham v. Motor Freight,* 304 Mich. 136. Prior to its commencement, the compensation insurance carrier had paid certain nursing and hospital charges incurred by respondent, but these were paid directly to the nurses and to the hospital without the respondent's knowledge and at a time when he was unable to get out of bed and was under the care of three special nurses. The Trial Court and the Court of Appeals both held that there was nothing in these circumstances which could be held to constitute an election by the respondent to proceed for compensation. In so holding, the courts were following the only decision of the Michigan Supreme Court which decided this identical point, *Fox v. Detroit United Railways,* 218 Mich. 5. The major changes in the Michigan Workmen's Compensation Act in 1943 did not affect the holding of the Fox case since neither the election of remedies section nor that relating to medical payments were modified by the 1943 changes.

Petitioner asserts that the instant case is in conflict with the decision in *Dinardo v. Consumers Power Company,* 181 F. (2d) 104, C. C. A. 6. The facts in the two cases are

so dissimilar that the cases do not invite comparison. The decision in that case was written by the same judge, Florence Allen, who wrote the decision in the instant case.

The decision in the instant case is not, as petitioners assert, in conflict with *Dornbos v. Block & Guggeneimer, Inc.*, 326 Mich. 626, which merely held that a claim for medical expenses under the Compensation Act must be made within the time provided for making a claim for compensation. The case did not involve the question of election of remedies. The instant decision is in harmony with *Schulmeyer v. Motor Freight*, 323 Mich. 142, rather than being in conflict with that decision as petitioner alleges. The Schulmeyer case holds that the test of whether an employee has elected to proceed for compensation is a question of the employee's intent and that he will be held to have intended the consequence of his own affirmative acts. In that case he had written the compensation commission asking to have weekly benefits, previously discontinued, renewed. There was no such conduct on the part of respondent.

The Trial Court and the Court of Appeals properly followed the Michigan law and Michigan cases.

Moreover, the statute involved herein was amended in 1952 so as to eliminate the election of remedies provision so that except for a few pending cases the issue raised is academic.

II.

RULING THAT 1952 AMENDMENT TO ELECTION OF REMEDIES PROVISIONS OF MICHIGAN WORKMEN'S COMPENSATION ACT IS RETROACTIVE SUPPORTED BY CASE LAW AND LEGISLATIVE HISTORY

The election of remedies provision of the Michigan Compensation Act was amended in 1952 so that the employee is no longer required to elect whether he will proceed for compensation under the Act or sue the third person, but may pursue both remedies, provided that in case of recovery against the third person, the employee must reimburse the compensation insurance carrier of the employer.

The Court of Appeals in the instant case ruled that this amendment was retroactive and applied to accidents occurring before its enactment. It should be noted that this ruling was not essential to the Court's decision since it had already held that there had been no election. The Court of Appeals' ruling on this question of the retroactive effect of the statute followed well established Michigan law that remedial statutes are to be given retroactive effect. *Judd v. Judd,* 125 Mich. 228; *Heineman v. Schloss,* 83 Mich. 153; *Nash v. Robinson,* 226 Mich. 146.

It is difficult to conceive of a statutory change that could be more remedial than one abolishing the requirement that a party elect between two remedies.

Moreover the legislative history of this amendment shows that the Michigan Senate as the Committee of the Whole first adopted a provision that the abolition of the election of remedies provision be prospective only and that the only employees "as shall not have heretofore elected a remedy," (*Journal of the Senate of the State of Michigan,* February 25, 1952, #34, p. 491), should benefit

from the 1952 amendment. The history of the Act shows, however, that the legislature refused to so limit the effect of the 1952 amendment and the amendment was passed without such restriction.

The case cited by petitioners in their brief, *Tarnow v. Railway Express Agency,* 331 Mich. 558, involved a 1943 amendment to the Compensation Act which, if given retroactive effect, would have destroyed rights the employee previously had. It was not a question of remedies.

There is no conflict between the decision in the instant case and that in *Nelson v. Westland Oil Company,* 181 F. 2d 371, C. C. A. 8. The Court there, as in the instant case, held that an amendment to the North Dakota compensation act was retrospective in effect and reversed the trial court. Since the case was sent back to the District Court, the Court of Appeals did not, as petitioner asserts, cast doubt on its holding, when it instructed the District Court to follow any decision by the Supreme Court of North Dakota, which might be handed down before the matter was disposed of. The instruction was merely a directive to the principle of *Erie v. Tompkins,* 304 U. S. 64, to follow state decisions on state law.

Moreover, the Court of Appeals for the Eighth Circuit was considering North Dakota law, a North Dakota statute with legislative history in the North Dakota legislature. The Circuit Court of Appeals for the Sixth Circuit in the instant case was considering Michigan cases, a Michigan statute, and its legislative history in the Michigan Legislature.

The question of whether the 1952 amendment to the Michigan Workmen's Compensation Act is retroactive is of no great significance since it can affect only the limited number of cases which were pending when the Act was amended.

III.

COURT OF APPEALS PROPERLY HELD THAT RESPONDENT NOT BARRED FROM RECOVERY BY DOCTRINE OF ASSUMPTION OF RISK

The *Restatement of Torts* §466 considers assumption of risk in those cases which do not involve master and servant, as a form of contributory negligence. The Michigan Supreme Court appears to have similarly characterized it. Thus in *Reedy v. Goodin*, 285 Mich. 614, the assumption of risk by plaintiff was treated by the Michigan Supreme Court as a form of contributory negligence. On page 619, the court said:

> "Defendant contends plaintiff was guilty of contributory negligence as a matter of law, that under the undisputed evidence plaintiff voluntarily assumed the risk of a known danger and brought himself within the operation of the maxim *volenti non fit injuria.*"

We are concerned only with a question of Michigan law in the instant case. The Court of Appeals seems properly to have chosen to rely upon the Restatement.

It is not quite clear whether petitioners object to the substance of the law as it is defined in the Restatement or to its application by the Court of Appeals in the instant case.

It is readily apparent that the Court of Appeals properly followed the rule of the Restatement if the following comparison of the language of the Court's opinion and the text is made:

COURT'S OPINION	RESTATEMENT (§466)
"intentional exposure of himself by a workman to a known danger."	"he should realize the danger involved."
	"must intentionally expose himself to this danger"

	"his intentional exposure of himself to the known danger must be unreasonable."
"must be so unreasonable that a reasonably prudent man in his position would not do so."	"In order that it may be unreasonable it is necessary that a reasonable man in his position would not expose himself to it."

IV.

EVERY STATEMENT OF FACT IN OPINION OF COURT OF APPEALS WELL SUPPORTED BY RECORD

The opinion of the Court of Appeals as originally filed contained one immaterial misstatement of fact. Considering that the record contained 480 pages, the accuracy of the Court's recitation of the facts is commendable. The misstatement was corrected following petitioners' Petition for Rehearing. The statements of facts which are not supported by the record are the statements in petitioners' brief.

The record supports the Court's statement that the crane was not moving when the respondent (plaintiff below) started to climb down. One of petitioners' (defendants below) own employees testified that the crane was still stationary even when the respondent (plaintiff) had started climbing down (R. 211).

There is likewise ample support for the Court's statement that "Presumably plaintiff's rope slipped over the side of the pick for two witnesses saw it hanging down from 8 to 10 feet before the crane started to move (R. 483.)"

Petitioners' own employee testified the rope was hanging down while respondent was climbing down (R. 91, 92, 105,

211). It is true that neither Mr. Buckner nor his fellow painter noticed the rope hanging down but both testified that it could have been hanging down and they not have noticed it (R. 317, 153). There was testimony that in dropping the 75 foot rope down unto the narrow aluminum platform, it was extremely difficult to get the whole of it on the platform (R. 266) and that respondent, Clarence Buckner, was at such an angle above the pick that he could not see whether all of the rope was on the pick (R. 317). There is absolutely no testimony to support an inference that Buckner kicked the rope from the platform as he climbed on it since petitioners' own employee testified that the rope was hanging down while Buckner was still climbing in the superstructure (R. 91, 92, 105, 211).

The respondent was not required to supply every fact by his own testimony alone, but was entitled to have the jury consider the testimony of all of his witnesses.

When the Court of Appeals in its opinion speaks of a lookout on the crane being better able to "foresee the possibility of an accident" than a lookout on the ground, it is discussing the relative advantages of the lookouts' positions and is not defining negligence. Thus the use of the word "possibility" is quite proper. There is support for the Court's conclusion that the lookout on the crane has the superior position in the testimony of the crane operator himself (R. 242, 243).

Petitioners object to the statement of the Court of Appeals that "Defendants had notice of the particular hazard because of the near accidents and dangerous situations which involved the crane shortly before this occurrence (R. 484)" as not supported by the record. The other near accidents, it is true, did not perhaps involve the identical rope nor did they happen in the identical place of the

instant accident, but they did involve ropes or other equipment getting entangled with the superstructure of the same crane (R. 119, 246, 334), and would seem to have given petitioner notice that workmen's ropes would become involved with the superstructure of the crane unless a lookout was kept. It must be remembered that the mill was in the process of construction and that there were employees of several sub-contractors, men in many different trades, all working in the mill building.

Contrary to petitioners' statement on page 18, there was no practice in the plant of stopping the crane while paint was being pulled up. The only testimony in this respect was that on other occasions while paint was being pulled up, it had been necessary to yell at the crane operator to stop the crane when he attempted to come through while paint was being pulled up (R. 333, 335).

There is likewise support for the Court's statement that Buckner was doing what any ordinary workman would have done under similar circumstances. Buckner and his partner were both painters experienced in doing construction work. They were following their usual practice (R. 257, 304). Their foreman testified that it was the only way the work could be done and that the rope was lowered in the only way it could be (R. 335).

V.

PETITIONERS' MOTION FOR MISTRIAL PROPERLY REFUSED WHERE MENTION OF INSURANCE INADVERTENT

During the course of the trial, in response to a question by his counsel as to what doctors he had seen, Mr. Buckner responded with the names of several doctors and concluded with the statement that the last one was the doctor for the insurance company. The remark was immediately stricken and the jury instructed to disregard it. No motion for mistrial was made until the close of the plaintiff's case. It is well settled by Michigan cases that mention of insurance is not basis for a mis-trial unless the subject is "deliberately injected into the case by counsel" or unless "improper use of it is made by counsel for the evident purpose of inflaming the passions of the jury." *Watroba v. City of Detroit,* 334 Mich. 182, at 191, 192. The trial court in the instant case found that there had been no bad faith on the part of the witness or counsel (R. 361). The cases cited by petitioners (Petition for Certiorari, page 20) recite the same rule of law as the Watroba case, *supra,* which strangely is the principal case relied upon by petitioners, yet it holds directly against their contention.

VI.

MOTIONS FOR DIRECTED VERDICT OF NO CAUSE OF ACTION AND FOR JUDGMENT NON OBSTANTE VEREDICTO PROPERLY DENIED

Under admittedly proper instructions, the jury by its verdict for the plaintiff (respondent) found plaintiff free from contributory negligence. Petitioners in their reply brief urge that respondent should be held guilty of contributory negligence as a matter of law because although he observed that the crane was stationary when he started

lowering the platform, he did not make any further observation before starting to climb down to the new location of the platform. Assuming that he should have made such subsequent observation, his failure to do so had no relation to the accident since petitioners' own superintendent testified the crane had not started to move when respondent was climbing down to the new location of the platform (R. 211). *Uzich v. E. & G. Brooke Iron Co.*, 76 Fed. Supp. 788, a Pennsylvania District Court decision, is essentially different from the instant case in that the plaintiff in that case chose a dangerous course of conduct when a safe method was readily available.

Contrary to the assertion made by petitioners (p. 21) respondent, although he had not actually seen a safety man on the crane, assumed that there was one (R. 307, 319). He further testified that the usual practice was to ring the bell on the crane before it was moved (R. 305).

Several of respondent's witnesses, all of them petitioners' employees, testified that the warning bell on the crane was not rung (R. 93, 94, 116, 154, 169, 170, 132, 265). Petitioners' employees further testified that it was the usual practice to have a safety man ride on the crane where he could see that there was nothing in the path of the crane (R. 136). The operator of the crane, because of the construction of the cab, could not see up into the superstructure (R. 242-243).

It should be noted that there is nothing mentioned by petitioners under Point VI as to why the Supreme Court shall be called upon to review this question. Apparently petitioners weren't able to think of any reason why review should be granted. Respondent is not able to think of any either.

VII.

LOWER COURTS PROPERLY REFUSED TO GRANT MOTION FOR NEW TRIAL

The chief reason urged here for a new trial is a claim that the verdict was excessive. The opinion of the Court of Appeals exhaustively considers this question and after reviewing the injuries sustained by the respondent concludes that the verdict was not excessive. Respondent sustained a comminuted fracture of the left femur; compound fracture of the right ankle which involved the tibia and fibula for about 3 inches which was very badly comminuted (R. 278); compression fractures of the fourth lumbar vertebra; damage to the nerves of the spinal cord which produced a partial paralysis of the urinary bladder and the lower bowel (R. 279-280); badly comminuted fracture of the left wrist. His right foot is like a claw. He has little feeling in it and cannot move the toes, foot or ankle at all (R. 272). He has no control over it whatsoever (R. 272). Mr. Buckner was in the hospital continuously from June 30, 1949 until February 12, 1950, with three special nurses for the first six months (R. 271). For the whole of the first seven months, he lay on his back unable to get out of bed (R. 270). In February of 1951 he had an operation on his spine in an attempt to obtain a return of bladder and bowel functions (R. 298) and to remedy the complete paralysis which affected the anal regions and the reproductive organs (R. 302). The operation was not successful because the paralysis was due to damage to the nerves in the spinal cord which were torn apart (R. 300, 301) and not just squeezed as had been hoped (R. 301). Respondent will have to be given an enema every day or every other day for the rest of his life (R. 274). Since he has no control over his bladder, he must be near a urinal

at all times (R. 274). In view of these injuries, the verdict seems no more than adequate. There neither is nor ever was any claim that the trial court's instructions relating to damages were improper.

The rule of damages which the petitioner's claim the District Court and the Court of Appeals ignored is the rule in death cases where there is no pain and suffering and the only item recoverable is the pecuniary loss to the next of kin. It has no application in cases where there is permanent injury, and pain and suffering, both past and future.

Petitioners mention other grounds for a new trial without discussing them. Each was argued extensively in the briefs filed in the Court of Appeals. The Court recites in its opinion that:

> "The numerous contentions with reference to error at the trial have been considered and are overruled. The trial court did not abuse its discretion in denying the motion for new trial. * * * We find no reversible error in the admission of the testimony, in the conduct of the trial or in the charge of the court."

There is no reason to believe that it did not do so.

VIII.

NO CONDUCT ON PART OF COURT OF APPEALS OR DISTRICT COURT WHICH CALLS FOR EXERCISE OF SUPREME COURT'S POWER OF SUPERVISION

The conduct of both the District Court and of the Court of Appeals was in all respects proper and judicious. Reference is made by petitioners to the "comments" of these courts but no particular comment is complained of. Respondent knows of no remark or ruling by either court which it could even be pretended was prejudicial.

The case of *Quercia v. U. S.*, 289 U. S. 466, cited by petitioners involved a situation so remote from that in the instant case that comparison is impossible. That case was a criminal action in which the trial court instructed the jury that the defendant's conduct during the trial, i.e., wringing his hands, was in the judge's opinion, evidence that he was guilty of the offense charged. The Supreme Court held that the accused had not had a fair trial. In the instant case the record discloses that the conduct of the trial was fair in all particulars. Careful consideration was given to petitioners' requests for instruction (R. 361-375).

It is certain that petitioners' "Petition for Rehearing" in the Court of Appeals was carefully considered since the minor misstatement of fact in that court's opinion which was pointed out therein was promptly corrected.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari be denied.

Respectfully submitted,

JAMES A. MARKLE,
CORNELIA GROEFSEMA,
Counsel for Respondent.

Dated: July 10, 1953.